No._____

UNITED STATES OF AMERICA
BEFORE THE DEPARTMENT OF COMMERCE

Weaver's Cove Energy, LLC
Appellant,

vs.

Massachusetts Office of
Coastal Zone Management
Respondent.

INITIAL BRIEF FOR APPEAL OF WEAVER'S COVE ENERGY, LLC UNDER THE COASTAL ZONE MANAGEMENT ACT

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STATEMENT OF CASE

The Federal Energy Regulatory Commission ("FERC" or "Commission") has conditionally authorized Weaver's Cove Energy, LLC ("Weaver's Cove") to build a liquefied natural gas ("LNG") receiving terminal in Fall River, Massachusetts, on the site of a former petroleum terminal in a Massachusetts "Designated Port Area" legally reserved for water-dependent industrial uses. FERC found this energy project to be in the public interest, as it will bring much needed incremental natural gas supply to the New England region. Pursuant to the Coastal Zone Management Act ("CZMA" or "Act"), the FERC approval order for the LNG terminal requires Weaver's Cove to obtain concurrence from the Massachusetts Office of Coastal Zone Management ("MCZM") with Weaver's Cove's certification that the project is consistent with the Massachusetts coastal zone management program ("MCZMP").

In addition, in order to facilitate the transit and berthing of ships delivering LNG to the terminal, Weaver's Cove must obtain permits from the United States Army Corps of Engineers ("USACE") for dredging and offshore disposal of dredged materials, and the construction of a jetty and other shoreline improvements. Weaver's Cove has also sought a USACE permit to dredge and backfill the Taunton River crossing for a pipeline lateral to be constructed and operated by its affiliate, Mill River Pipeline, LLC ("Mill River"), that will connect the LNG terminal to the interstate pipeline grid (the USACE-permitted activities, together with the LNG terminal, the "Weaver's Cove Project" or "Project"). The USACE permits also require the consistency determination from MCZM.

On January 4, 2007, after years of meetings with MCZM and informational draft submissions, Weaver's Cove submitted to MCZM the requisite certification of the Project's consistency with the enforceable policies of the MCZMP for MCZM's concurrence. Weaver's

Cove's consistency certification demonstrated that the LNG terminal and associated dredging activities will be consistent with the MCZMP's enforceable policies. On January 10, 2007, MCZM found that Weaver's Cove had submitted all of the required documentation to initiate MCZM's consistency review. MCZM, however, subsequently objected to the consistency certification on July 6, 2007, asserting that Weaver's Cove had failed to obtain certain final state licenses and permits that MCZM deemed necessary before it could issue its concurrence.

In accordance with the Act, MCZM's objection precludes Weaver's Cove from receiving the USACE permits and satisfying the FERC condition, unless, on this appeal, the Secretary of Commerce ("Secretary") overrides MCZM's objection. The Secretary should override MCZM's objection to the consistency certification because this energy Project is consistent with the objectives of the Act. In addition, and alternatively, the objection should be overridden because the energy Project is otherwise necessary in the interest of national security.

STATEMENT OF FACTS

1. Weaver's Cove proposes to construct and operate an LNG receiving terminal in Fall River, Massachusetts. The LNG terminal is proposed to be developed on an industrial site that had been a petroleum products marine terminal and storage facility since the 1920s. *Weaver's Cove Energy, LLC*, 112 FERC ¶ 61,070 at P 100 (2005) ("Approval Order") (Attached at A-3), *order on reh'g*, 114 FERC ¶ 61,058 (2006) ("Order on Rehearing") (Attached at A-4). This site is located in a Designated Port Area ("DPA"), an area within the coastal zone established under Massachusetts law as being specifically designated for the preservation and enhancement of marine industrial development. 301 Mass. Code Regs. 25.0. A pictorial view of the coastal zone along the Taunton River from the Braga Bridge to the terminal site may be seen in Figure 1 attached.

2. In May 2005, FERC Staff, in conjunction with the U.S. National Marine Fisheries Service ("NOAA Fisheries"), the USACE, the U.S. Environmental Protection Agency ("EPA"), and the U.S. Coast Guard (together, "FEIS cooperating agencies"), issued a Final Environmental Impact Statement ("FEIS") for the Project pursuant to the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.*, concluding that if the Project is constructed and operated in accordance with recommended mitigation measures, the Project would have limited adverse environmental impact. Weaver's Cove LNG Project, FEIS, Docket Nos. CP04-36-000 and CP04-41-000, at ES-14 (May 2005) (Attached at A-5). These recommendations were subsequently included as conditions to the Approval Order. *See* Approval Order, App. B.

3. On July 15, 2005, FERC approved Weaver's Cove's application for authority to construct and operate the LNG terminal, and a concurrent application by its affiliate, Mill River, for a certificate of public convenience and necessity authorizing the construction of associated natural gas pipeline facilities to transport regasified LNG from the LNG terminal to the interstate pipeline grid. *See generally id.* FERC found that Weaver's Cove's proposed LNG terminal "will promote the public interest by increasing the availability of natural gas supplies in the New England market." *Id.* at P 5.

4. FERC, in Condition No. 23 of the Approval Order, required Weaver's Cove to provide documentation of concurrence from MCZM that the Project is consistent with the MCZMP. *Id.*, App. B at Condition No. 23.

5. Weaver's Cove proposes to conduct maintenance and improvement dredging of an existing Federal Navigation Channel in Massachusetts waters to facilitate the transit of LNG ships to the LNG import terminal, as well as some maintenance and improvement dredging of the existing ship turning basin adjacent to the proposed terminal site. To aid the berthing and unloading of LNG vessels, Weaver's Cove also proposes shoreline improvements and a jetty

structure. Additionally, on behalf of Mill River, Weaver's Cove proposes to undertake dredging and backfilling of the Taunton River crossing for one of the Mill River pipeline laterals.

6. On March 18, 2004, Weaver's Cove filed with the USACE applications for dredge and fill permits under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, and Section 404 of the Clean Water Act, 33 U.S.C. § 1344, for authorization to conduct the proposed dredging of the Federal Navigation Channel and turning basin, dredging and backfilling for the Taunton River crossing of Mill River's lateral, and construction of the LNG terminal's required jetty structure and shoreline improvements.

7. On March 17, 2005, the USACE application was amended by Weaver's Cove to include a request for approval of offshore disposal of dredged materials under Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. § 1401, *et seq.* The USACE and the EPA have determined that all sediments to be dredged meet the criteria required for ocean disposal, and are suitable for unrestricted ocean disposal at the offshore locations proposed by Weaver's Cove. *See* Consist. Cert., App. G (USACE/EPA Tier III Suitability Determination (Sept. 22, 2005)); EPA, Memo For The Record (July 12, 2007) (Attached at A-6).

8. The Project activities related to the USACE permits require a consistency determination from MCZM. Because, *inter alia*, MCZM has not issued a consistency determination, the USACE has not issued its permits

9. In order to obtain the consistency determination, on January 4, 2007, Weaver's Cove submitted to MCZM a certification of the Project's consistency with the MCZMP, together with all required information ("Consist. Cert.," attached at A-1). This information included copies of federal permit applications and a copy of the final "Secretarial Certificate" from the Massachusetts Executive Office of Environmental Affairs indicating that no further review was required under the Massachusetts Environmental Policy Act ("MEPA").

10. On January 10, 2007, Weaver's Cove received a letter from MCZM stating that Weaver's Cove had submitted the required documents for initiating a consistency review, and that the state's review had commenced as of January 9, 2007. (Attached at A-7).

11. Between January 4, 2007 and July 6, 2007, Weaver's Cove responded to all of MCZM's written requests for additional information.

12. As part of the overall permitting process for the Project, Weaver's Cove also had pending before the Massachusetts Department of the Environment ("MADEP") applications for a number of environmental permits. On April 6, 2007, MCZM notified Weaver's Cove that "CZM's Federal Consistency Certification decision is contingent on prior receipt of all necessary state licenses, permits, and certifications." (Attached at A-8).

13. On June 4, 2007, MADEP abruptly and unilaterally stayed the processing of all remaining MADEP permits, (attached at A-9), only a few weeks after it had advised Weaver's Cove that all remaining permits would be issued by the end of June.

14. On July 6, 2007, MCZM objected to Weaver's Cove's consistency certification, alleging that Weaver's Cove failed to obtain applicable state licenses and permits "necessary to CZM's federal consistency review." (Attached at A-2). Weaver's Cove was precluded from providing MCZM with the requested state licenses and permits because MADEP decided that it would cease processing these permits.[1]

15. The appeals process under the Act "is an important component of the CZMA formula to balance State-Federal-private interests. The Secretary's consideration of the national interest in the CZMA objectives is a 'check' on the State's authority to block projects affecting

[1] MADEP's refusal to process the licenses and permits before it should not impede the Secretary's review of this appeal or his ability to override MCZM's objection. If MADEP's refusal were permitted to impede this appeal, no project facing state or local opposition would ever be able to move forward.

State coastal uses or resources." Coastal Zone Management Act Federal Consistency Regulations, 71 Fed. Reg. 788, 822 (Jan. 5, 2006).

SUMMARY OF ARGUMENT

MCZM's objection should be overridden because the Project is consistent with the objectives of the Act. The Project is an energy-related coastal activity that furthers the national interest as set forth by the Act in a significant and substantial manner by helping meet the future energy needs of the New England region. The Project's contribution to the national interest outweighs the limited impacts to the coastal resources of the DPA at which it is proposed to be sited, and there is no reasonable alternative to the Project. In addition, the Project's contribution to national security is an alternative ground on which MCZM's objection should be overridden. By diversifying energy supply, the Weaver's Cove Project is necessary in the interest of national security. The Secretary should, therefore, override MCZM's objection.

ARGUMENT

I. THE WEAVER'S COVE PROJECT IS CONSISTENT WITH THE OBJECTIVES OF THE COASTAL ZONE MANAGEMENT ACT

The Secretary should override MCZM's objection on the ground that the Weaver's Cove Project is consistent with the objectives of the Act. 16 U.S.C. § 1456(c)(3)(A). As a major FERC-approved LNG import project which is coastal-dependent because it will rely on deliveries of LNG by ship, the Project is consistent with the objectives of the Act.

Under the regulations administering the CZMA, an activity will be considered consistent with the objectives of the Act if each of the following is satisfied: (a) the activity furthers the national interest as articulated in Section 302 or 303 of the CZMA in a significant or substantial manner ("Element 1"); (b) the national interest furthered by the activity outweighs the

activity's adverse coastal effects, when those effects are considered separately or cumulatively ("Element 2"); and (c) there is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the state's coastal zone management program ("Element 3"). 15 C.F.R. § 930.121. As demonstrated below, the Weaver's Cove Project readily satisfies each of these three elements.

A. Element 1 — The Weaver's Cove Project Furthers the National Interest in a Significant and Substantial Manner

The Weaver's Cove Project promotes the national interest articulated in Section 303 of the Act in a significant and substantial manner for two reasons, each of which is independently sufficient for the Secretary to find that the Project satisfies Element 1. First, the Project will significantly and substantially further the national interest in siting major coastal-dependent energy facilities. *See* 16 U.S.C. § 1452(2)(D). Second, the Project will further the national interest by developing the resources of the coastal zone. *See* 16 U.S.C. § 1452(1). As explained below, the furtherance of each of these national interests by the Project is both substantial and significant because of the scope, magnitude and importance of the Project and its benefits. With respect to satisfying Element 1, because Congress has broadly defined the national interest in the coastal zone in Sections 302 and 303 of the Act, this first element of the consistency standard "normally will be satisfied on appeal."[2]

1. The Weaver's Cove Project Furthers the National Interest in Siting Major Coastal-Dependent Energy Facilities.

One of the objectives of the Act is to give "priority consideration . . . to coastal-dependent uses and orderly processes for siting major facilities related to . . . energy." 16 U.S.C.

[2] *See Decision and Findings in the Consistency Appeal of Mobil Oil Exploration & Producing Southeast, Inc.* (Sept. 2, 1994), at 13 ("*Mobil Southeast*"); *Decision and Findings in the Consistency Appeal of Amoco Production Company* (July 20, 1990), at 14 ("*Amoco*").

§ 1452(2)(D). The Weaver's Cove Project promotes this objective because it will be a major, coastal-dependent energy facility.

The Act defines "energy facilities" as "any equipment or facility which is or will be used primarily in the exploration for, or the development, production, conversion, storage, transfer, processing, or transportation of, any energy resource." 16 U.S.C. § 1453(6). The Project qualifies as a "facilit[y] related to . . . energy" because it will provide significant energy supply to New England through the importation, storage, and regasification of LNG, as well as by delivering LNG to peakshaving storage facilities[3] throughout New England by truck. The Project facilities are also "major" because of their value and capacity. *See Decision and Findings in the Consistency Appeal of Islander East Pipeline Company, L.L.C.* (May 5, 2004), at 8 ("*Islander East*"), *set aside on other grounds*, *Connecticut v. U.S. Dep't of Commerce*, No. 3:04cv1271, 2007 WL 2349894 (D. Conn. Aug. 15, 2007).[4] The Project facilities will cost an estimated $500 million to construct, and will have the capacity to provide 800 million cubic feet per day ("MMcf/d") of natural gas, Approval Order at P 9, or about 15%[5] of the New England region's peak day natural gas requirements. *Cf. Islander East* at 8 (finding that an energy facility

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[3] "Peakshaving storage facilities" refers to satellite LNG tanks where LNG is stored and delivered to local distribution companies in those periods of time when demand for utility service exceeds the available pipeline supply, as on a cold winter's day.

[4] *Islander East* remains authoritative with respect to Element 1. The court in *Connecticut v. U.S. Dep't of Commerce* found that "the Secretary's Decision shows that he considered the proper standards concerning this [first] element . . . and then made a reasoned determination that the factor had been satisfied. As a result, his decision regarding element one was not arbitrary and capricious." 2007 WL 2349894, at *9.

[5] This figure is calculated assuming a peak daily sendout for the Project of 800 MMcf/d, and an estimated peak day sendout in New England in 2010 of between 4.8 and 5.5 billion cubic feet. *See* The Power Planning Committee of the New England Governors' Conference, Inc., *Meeting New England's Future Gas Demands: Nine Scenarios and Their Impacts*, A Report to the New England Governors ("Governors' Report") (Mar. 1, 2005), at Table 3-4. (Attached at A-10).

was "major" because of its estimated cost of $180 million and capacity to provide approximately 250 MMcf/d of natural gas, sufficient to heat 600,000 homes). Finally, the Project is a coastal-dependent use because LNG will be delivered via ocean-going LNG ships that will berth and unload at the LNG terminal. As a coastal-dependent, major energy facility, the siting of the Weaver's Cove Project furthers the national interest articulated in Section 303 of the Act.[6]

2. The Weaver's Cove Project Furthers the National Interest in the Development of the Coastal Zone.

The Weaver's Cove Project also furthers the national interest articulated in Section 303 of the Act in "develop[ing] . . . the resources of the Nation's coastal zone." 16 U.S.C. § 1452(1). The Project promotes this objective because it is a proposal for the utilization of coastal resources for economic and industrial development. *See Decision and Findings in the Consistency Appeal of Davis Heniford* (May 21, 1992), at 6 (stating that "it is clear that commercial development is one of the recognized competing uses of the coastal zone").

The Project constitutes development of the coastal zone because, through the modification of a limited part of the coastal zone, it will "allow its use for a particular purpose that was previously not available" — namely the importation of natural gas via marine vessels to meet growing regional demand. *See Islander East* at 6. The Project, through the proposed dredging, also constitutes development of the coastal zone by improving an existing marine navigation channel to allow its use for a particular purpose that was previously not available (*i.e.*, the transit and berthing of vessels with a draft of up to 37 feet). *See id.*

[6] The dredging activities proposed by Weaver's Cove "are directly associated with and further its proposed" siting of coastal-dependent energy facilities. *See Mobil Southeast* at 13. The dredging activities therefore also satisfy this element of the consistency standard "even if they only indirectly further" this objective of the CZMA. *Id.* at 13-15.

In this case, the LNG terminal is proposed to be developed on a site that had been a petroleum products marine terminal and storage facility since the 1920s, FEIS at 5-12, and in a DPA, an area within the coastal zone established under Massachusetts law as being specifically designated for the preservation and enhancement of marine industrial development. 301 Mass. Code Regs. 25.0. Massachusetts, operating through MCZM, decided to select specific coastal zones, including the proposed project site in Fall River, as DPAs because "it makes both good environmental and good economic sense to steer future maritime commerce into harbor areas that have already been altered extensively — at great public expense — to meet the special operational requirements of such commerce." Executive Office of Environmental Affairs, *The 1994 Designated Port Area (DPA) Regulations* (Dec. 15, 1994) (codified at 301 Mass. Code Regs. 25.0). The siting of the LNG terminal and the associated dredging activities in the DPA are the type of development contemplated by the CZMA and the MCZMP.

3. The Weaver's Cove Project Furthers the National Interest in a Significant and Substantial Manner.

The Weaver's Cove Project furthers the national interest, in both the siting of major coastal-dependent energy facilities and the development of the coastal zone, in a significant and substantial manner. A project furthers the national interest in a *substantial* manner if it "contribut[es] to the achievement of a CZMA objective to a degree that has a value or impact on a national scale." *Islander East* at 6 n.26. *See also* Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 77,124, 77,150 (Dec. 8, 2000) ("2000 Final Rule"). A project furthers the national interest in a *significant* manner if it "provid[es] a valuable or important contribution to a national interest [identified in the CZMA] without necessarily being large in scale or having a large impact on the national economy." *Islander East* at 6 n.26. Accordingly, to determine whether a project significantly or substantially furthers

the national interest, the 2000 Final Rule instructs appellants to consider the following factors: (1) the degree to which the activity furthers the national interest, *i.e.* its substantiality; (2) the nature or importance of the national interest furthered as articulated in the CZMA, *i.e.* its significance; and (3) the extent to which the activity is coastal-dependent. 2000 Final Rule at 77,150.

The Project significantly and substantially furthers the national interest in both the siting of major coastal-dependent energy facilities and the development of the coastal zone because, as discussed above, it qualifies as a major coastal-dependent energy facility under the CZMA. Major coastal-dependent energy facilities "typically fulfill the requirement" of "significance or substantiality" by their very nature. *Islander East* at 5 (referencing the 2000 Final Rule at 77,150). According to the 2000 Final Rule, the siting of energy facilities is an example of "an activity that significantly or substantially furthers the national interest" because such energy facilities "are coastal-dependent industries with economic implications beyond the immediate locality in which they are located." 2000 Final Rule at 77,150. In *Islander East*, the Secretary found that because a facility met the definition of "energy facilities" and was "also coastal-dependent," it "further[ed] the national interest in a significant and substantial manner." *See Islander East* at 5-6. The same is true of the Project.

The Project also significantly and substantially furthers the national interest because of the magnitude of its size, its scope, and its importance measured by economic value and delivery capacity. As noted above, the Project facilities will cost an estimated $500 million to construct, and will have the peak day capacity (*i.e.* 800 MMcf/d) to provide enough natural gas to heat over one million homes. *See id.* at 5 n.19, 8-9 (finding that an energy project's value of $180 million, and its delivery capacity of about 250 MMcf/d, significantly and substantially furthers the national interest). The dredging and related offshore disposal activities alone will

cost between $31 million and $70 million, FEIS at 3-77, and will also benefit both the regional maritime industries who utilize the Federal Navigational Channel and the taxpayers who ordinarily would have borne the cost of maintenance dredging. *See* Consist. Cert. at 3; Resource Report 5, at 5-15 (Attached at A-11). Moreover, the Project is significant because it will provide a new source of clean-burning fuel that will have environmental benefits beyond the immediate location of the Project. *See* FEIS at 4-311. *See also Islander East* at 5.

The Project also significantly and substantially furthers the national interests set forth above because of the benefits that will result from the Project. The consideration of the benefits of the Project is relevant because "[t]he benefits of the [facility] are a direct consequence of the [coastal] modifications that comprise [the project] and therefore are appropriately considered in determining the degree to which the [p]roject furthers the national interest in coastal zone development." *Id.* at 6. Here, the benefits— discussed below — include: (1) meeting growing demand for natural gas in New England; (2) enhanced energy reliability; and (3) price competition resulting from the introduction of new incremental natural gas supply. Because of their extent, each of these benefits will "contribut[e] to [the development of the coastal zone] to a degree that has a value or impact on a national scale." *Id.* at 6 n.26. And, given the importance of energy infrastructure and supplies, the resulting benefits are significant because they will "provid[e] a valuable or important contribution to a national interest." *Id.*

In addition, the Project will significantly and substantially further the national interest because it will help meet growing energy demand in New England. Approval Order at P 51. *See Islander East* at 7 n.30 (finding that a project that "is needed to meet the growing demand for natural gas" in a region "furthers the national interest in a substantial manner"). The New England region's demand for natural gas is growing, in large part due to the increasing use of natural gas for electric power generation. Approval Order at P 6. The U.S. Energy

Information Administration ("EIA") projects that total gas consumption in New England will increase at an annual average of 1.38% between 2004 and 2024, but that U.S. domestic gas production will grow at a slower rate than demand. *Id.* According to the Governors' Report, to ensure reliable delivery of natural gas to the New England region after 2010, there must be a substantial amount of demand reduction or infrastructure development. *Id.* As the Approval Order recognizes, with a capacity to deliver up to 800 MMcf/d of natural gas to the region, the Weaver's Cove Project serves this very purpose. *Id.* at PP 9, 51 ("The LNG terminal facilities proposed here will enable the introduction of new gas volumes from new sources of supply into the New England area where substantial market growth is expected.").

Additionally, the Project will significantly and substantially further the national interest because it will enhance the reliability of energy supplies in New England by adding a new source of natural gas supply, as well as providing for the delivery of LNG by truck to peakshaving storage facilities. *Id.* at P 51. *See also Islander East* at 5 (discussing energy supply reliability as a benefit that furthers the national interest). As FERC has noted, truck delivery of LNG to remote peakshaving storage facilities "is more than simply an option for meeting New England's gas needs. It is, instead, a critical component in meeting those needs." Order on Rehearing at P 61. FERC found Weaver's Cove's proposal to provide a competitive source of trucked delivery of LNG would be "critical to maintaining a reliable source of natural gas to the region during peak use periods." *Id.* at P 60. Because these benefits will have a "scope, magnitude and importance beyond [the Project's] location in [and near Fall River, Massachusetts]," the benefits of the Project "are both substantial and significant." *See Islander East* at 5.

Finally, the Project significantly and substantially furthers the national interest because of the positive market effects expected to result. LNG imported through the LNG

terminal is anticipated to moderate energy prices through increased competition, which furthers the national interest substantially and significantly. *See Islander East* at 5 (finding that price competition resulting from the introduction of new natural gas supplies is a project benefit that furthers the national interest). The Secretary and FERC have recognized that a natural gas project that will enhance price competition furthers the national interest. *See id.* at 5; *Hackberry LNG Terminal, LLC*, 101 FERC ¶ 61,294 (2002) (attached at A-12) (holding that new LNG import terminals providing competitive sources of natural gas serve "[t]he public interest . . . through encouraging gas-on-gas competition by introducing new imported supplies of natural gas which will be accessible to all willing purchasers"). *See also* Approval Order at P 50.

B. Element 2 — The National Interests Furthered by the Weaver's Cove Project Outweigh Any Putative Adverse Coastal Effects

The national benefits of the Project outweigh its limited adverse impacts to the Massachusetts coastal zone, whether considered separately or cumulatively. 15 C.F.R. § 930.121(b). To the extent that there are adverse coastal effects resulting from the construction or operation of the Project, the extensive environmental record developed by the FERC and the other FEIS cooperating agencies, and through the state's MEPA and other permitting review processes, shows that these effects will tend to be both insubstantial in magnitude and temporary in effect.[7] In addition, Weaver's Cove will eliminate or mitigate potential adverse effects as required by the conditions of the Approval Order,[8] which were based on recommendations set

[7] The record for review in this appeal is fundamentally different from the record on review in *Islander East* and *Connecticut v. U.S. Dep't of Commerce*. Here, unlike in those proceedings, the federal or state agencies reviewing the Project have *not* provided *any* scientific studies or other evidence disputing the environmental analysis and conclusions set forth by the FEIS and in the submissions of Weaver's Cove before these federal and state agencies.

[8] *See* Approval Order, App. B. Once such conditions are included in a permit, the Secretary can rely on the implementation of these recommendations in his analysis. *See Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997) (observing that the efficacy of the mitigation measures

forth in the FEIS, and pursuant to mitigation plans developed as part of subsequent federal and state permitting reviews. Because the adverse effects of the Project on the coastal zone are temporary, minimal and/or mitigatable, these adverse effects do not outweigh the considerable national interests promoted by the Project, discussed in Section I-A, *supra*.

In its order approving the Project, FERC found that "the proposed action can be constructed and operated in an environmentally acceptable manner." Approval Order at P 105. The underlying FEIS concluded that the Project will have "limited adverse environmental impact" on the coastal zone, in part, because (i) the Project would make use of an existing industrialized site within a DPA, (ii) dredging associated with the Project would primarily occur within the previously dredged Federal Navigation Channel, (iii) Weaver's Cove would implement aquatic resource recommendations that would avoid or minimize impacts on fisheries resources; and (iv) Weaver's Cove would mitigate impacts on soils, wetlands and water bodies. FEIS at ES-14 to ES-15.

Moreover, as noted above, Massachusetts has specifically identified the section of the Taunton River where the Project is to be sited as a DPA, thereby favoring marine industrial development over any other use. Section 303 of the Act also explicitly recognizes that siting the Project in an existing industrial area serves the national interest in preserving and protecting the coastal zone, stating that priority consideration should be given to "locat[ing], to the maximum extent practicable, [] new commercial and industrial developments in or adjacent to areas where such development already exists." 16 U.S.C. § 1452(2)(D). MCZM also recognizes the benefits of industrial co-location in the enforceable policies of the MCZMP, providing that it is a policy

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is assured where they are included as mandatory conditions in the issued permits). *See also Decision and Findings in the Consistency Appeal of The Korea Drilling Company, Ltd.* (Jan. 19, 1989), at 5 ("*Korea Drilling*") (stating that the Secretary will rely on commitments of project proponent on appeal in analyzing project effects).

to "[p]reserve and enhance the capacity of [DPAs] to accommodate water-dependent industrial uses, and prevent the exclusion of such uses from tidelands and any other DPA lands."[9] Therefore, siting the Project on an existing industrial site in a DPA is not only consistent with the CZMA and the MCZMP, it will also have limited environmental effects because it does not require the development of extensive new supporting infrastructure.

1. Adverse Effects

To the extent that the Project will result in adverse coastal effects, or negative impacts on the natural resources of the coastal zone, *see Korea Drilling* at 10-11, such environmental impacts of the Project were thoroughly analyzed in the FEIS, during the MEPA review process, and during the development of the record before various permitting agencies. As discussed further below, the FEIS determined that these potential impacts would be minimal and temporary, either standing alone and/or after the institution of mitigation measures, thus allowing the FERC and the FEIS to conclude that the Project "would have limited adverse environmental impact." Approval Order at P 112. The conclusions reached in the FEIS were further supported by the extensive environmental review undertaken subsequently as part of additional federal and state review procedures, as outlined below:

Impacts of Dredging on Aquatic Resources

The Project would require the dredging of sediment from the Taunton River and Mount Hope Bay to facilitate LNG ship transit, disturbing approximately 151 acres of the river and bay in Massachusetts.[10] *See* Approval Order at P 107; FEIS at 2-25. While dredging of the Federal Navigation Channel and turning basin in Massachusetts waters may adversely affect

[9] MCZMP, Ports Policy #3, *available at* http://www.mass.gov/czm/policies.htm.

[10] A fuller description of the proposed dredging activities, including the Taunton River crossing, is included in the Consist. Cert., App. B at 7-9.

some fish and fish habitat, the evidence in the record demonstrates that many of these effects are not significant or are otherwise mitigatable. Foremost, all science-based studies in the record demonstrate that Project dredging activities will have *no* adverse impact on any species at any life stage, with only one limited exception: impacts to winter flounder eggs and larvae occurring from sediment deposition (*i.e.* burying from settled sediments) resulting from dredging near the turning basin. FEIS at 4-103. However, Weaver's Cove's adoption of mitigation measures required by FERC will eliminate all impacts to winter flounder spawning and juvenile development and will further minimize any other adverse effects on aquatic resources. *See* Approval Order, App. B. As discussed below, in addition to demonstrating that: (i) impacts to winter flounder eggs and larvae will be eliminated by certain mitigation measures, the evidence in the record establishes that: (ii) suspended sediments will not significantly impact the movement of anadromous fish; (iii) any chemicals present in dredge sediments will not adversely impact aquatic life; and (iv) direct impacts to winter flounder and quahog habitat will not be significant because of adopted mitigation measures.

As a preliminary matter, Weaver's Cove notes that in order to minimize the amount of sediment that enters the water column dredging activities, and thereby minimize the impacts on aquatic species from these sediments, Weaver's Cove has committed to the following dredging mitigation measures: (i) allowing no significant scow overflow during all seasons and at all dredge locations; (ii) using a closed or "environmental" bucket to reduce bucket loss rates; (iii) sequencing dredging operations to occur in a line parallel with the river flow in order to minimize the extent of suspended sediments across the width of the river during anadromous fish runs; and (iv) conducting a monitoring program to dredging operations. *See* FEIS at 3-72; 4-70 to 4-71, 4-105 to 4-106; Approval Order, App. B. These mitigation measures will be in addition

to mitigation measures to be undertaken to offset loss of fisheries habitat, as discussed in (iv) below.

(i) Impacts from Deposition of Sediments

The deposition of sediments from dredging generally could affect certain species in the coastal zone. FEIS at 4-100. With respect to this Project, Weaver's Cove undertook science-based modeling to assess the potential for direct and indirect impacts on different life history stages of aquatic species inhabiting the Project area from exposure to deposited sediments from dredging. The FEIS states that "[i]n regards to the effects of sediment deposition, the [modeling] results . . . indicated that no life history state of any species except winter flounder eggs would be exposed to the minimum effects threshold during dredging *regardless* of time of year or tidal conditions." FEIS at 4-103 (emphasis added). Because of this potential for some effects on winter flounder eggs in areas of winter flounder spawning habitat (*i.e.* shallow water), FEIS at 4-103 to 4-105, the Approval Order prohibits Weaver's Cove from undertaking dredging activities in any given year during the winter flounder spawning period (*i.e.* January 15 through May 31). Approval Order, App. B at Condition No. 21. *See also* FEIS 4-106; Supplemental Final Environmental Impact Report ("SFEIR"), Ex. 1-1 at 2 (Attached at A-13). Suspended sediment modeling conducted by Weaver's Cove indicates that these time of year dredging restrictions, in combination with mitigative measures to be undertaken by Weaver's Cove, *see* FEIS at 4-105, would "eliminate the majority of indirect winter flounder impacts associated with dredging." FEIS at 4-106.

(ii) Impacts from Re-suspension of Sediment in Water Column

Dredging operations will result in the temporary and localized re-suspension of sediment into the water column. *Id.* at 4-101. However, scientific studies (including modeling) show that sediment concentration from dredging in the water column would be below the

minimum threshold concentrations that would result in sub-lethal or lethal effects on fish, shellfish or any other marine organisms living in or migrating through the project area. FEIS at 4-101. *See also* Response to Comments on Federal Consistency Certifications ("Response"), Att. C (Responses to Comments on 401 Water Quality Cert. Appl. ("401 Resp."), at 4, 56-62, 64-67) (Attached at A-14). The models indicate "that the maximum total suspended solids (TSS) concentration would occur near the river bottom in close proximity to the dredging operation and would decrease both upstream and downstream of the dredge operation." FEIS at 4-70. The FEIS concluded that this modeling suggests "that suspended sediments and increased turbidity associated with dredging would be a *short-term effect* limited primarily to the time periods and areas when and where dredging would be conducted." *Id.* (emphasis added). Sediment concentrations would be expected to return to background levels within about 1,600 to 2,300 feet of dredging operations. *Id.* Modeling results further demonstrate that migrating fish passing upstream and downstream have large areas (75% or more under all dredge operating conditions) of the river and bay available for passage around the limited areas of elevated suspended sediment near the dredging operations. FEIS at 4-102. *See also* SFEIR at 4-2 to 4-7 & Fig. 4-1 (showing "fish eye view" (cross-section) and "bird's eye view" of sediment concentrations).

Notwithstanding the substantial evidence demonstrating that there are no adverse effects on migrating species from dredging (*see* ASA, Modeling Dredge-Induced Suspended Sediment and the Environmental Effects in Mt. Hope Bay and the Taunton River (with supplement) at Consist. Cert., App. G at Att. E; *see also* SFEIR at 4-7 to 4-15), subsequent to the publication of the FEIS, Weaver's Cove nevertheless has agreed to additional mitigation including bans on dredging during upstream fish migrations. *See* SFEIR at 4-7 to 4-10 & Ex. 1-1. Weaver's Cove has also identified specific mitigation to provide an added level of protection for downstream fish migration. *See* SFEIR at 4-10 to 4-13 & Ex. 1-1.

(iii) Impacts from Re-introduction of Chemicals in Water Column

There will be very limited, potential hazards posed to the aquatic environment by the re-introduction of organic and inorganic chemicals from bottom sediments into the water column through dredging activity. FEIS at 4-99. Elutriate tests and a sediment characterization study undertaken by Weaver's Cove to assess these effects concluded that most tested chemicals and metals would remain "tightly absorbed to the sediments," *id.*, and therefore would not be re-introduced from the bottom sediments into the water column. *Id.* Based on tests of only a single water sample completed at the time the FEIS was published, the FEIS found that copper and zinc could be released from the sediments into the water in concentrations that slightly exceed published EPA water quality criteria, but that the potential for such release to alter behavior, lower reproduction, or result in physiological responses through the uptake of the chemical by aquatic organisms "is limited." *Id.* The FEIS concluded that this potential impact would be limited because any elevated concentrations of dissolved contaminants resulting from dredging activities "would be expected to return to background levels within about 600 feet of the dredging operation." FEIS at 4-99 to 4-100. As a result, "the effect of these metals being released into the water would be localized and quickly diluted." FEIS at 4-100. Further, any possible impacts from copper and zinc are expected to be even more limited than recognized by the FEIS. Additional studies conducted subsequent to the publication of the FEIS "consistently demonstrate that copper and zinc concentrations are below the water quality criteria and are significantly below the single water sample and elutriate tests [relied upon in the FEIS]." *See* Section 401 Water Quality Cert. Appl. for Dredging, Att. A at 63-65 & Att. L (Attached at A-15); SFEIR at 3-1 to 3-5; Response, Att. C (Responses to Comments on Ch. 91 Licenses and Permit Appl. ("Ch. 91 Resp."), at 106 & 401 Resp. at 36-37).

The record also shows that there will be no long-term impact on the health of fish and shellfish after completion of the dredging operations due to the presence of trace chemicals in the sediments. FEIS at 4-100. Bottom fish and shellfish are currently exposed to contaminated sediments in the Taunton River on a continuous basis.[11] *Id.* Indeed, the exposure of organisms in the Taunton River to chemicals in sediments re-suspended as a result of dredging activities may be *less than* "exposure to these chemicals regularly experienced by the organisms in the river from re-suspension due to natural causes," such as storms. *Id.* The impact of chemicals in the sediments on dissolved oxygen levels in the water have also been shown not to be significant. *See* Response, Att. C (Ch. 91 Resp. at 130-32 & 401 Resp. at 47-49).

(iv) Direct Impacts to Fisheries Habitat

Increases in water depth in the turning basin as a result of dredging "would also have a direct impact on winter flounder egg habitat." FEIS at 4-106. Of the total proposed 21-acre turning basin expansion, water depth would increase to a level that is too deep to support winter flounder spawning in 11 of these acres. In order to offset this permanent loss of 11 acres of winter flounder spawning and juvenile development habitat, Weaver's Cove's proposes to: (1) plant or re-establish several acres of eelgrass beds in Narragansett Bay, (2) restock winter flounder directly, and (3) expand its habitat restoration program at the southern end of the terminal site to include approximately 0.25 acres of new open shallow subtidal habitat. *See* Consist. Cert., App. B at 18-22; SFEIR at 5-2 to 5-6.

Dredging and the development of the turning basin could also directly impact approximately 84 acres of mapped quahog habitat. To minimize impacts from dredging on

[11] In fact, due to current levels of contamination, shellfish harvesting is banned in the Taunton River, and quahogs are currently relocated for depuration prior to harvest in less contaminated areas. FEIS at 4-100.

quahogs in both the mapped area and outside the mapped area, Weaver's Cove will coordinate with federal and state resource agencies to harvest and relay commercially available quantities of quahogs from the entire dredging footprint prior to commencement of dredging, and to re-seed all disturbed areas after dredging is completed. FEIS at 4-98. *See also* Section 401 Water Quality Cert. Appl. for Dredging, Att. A at 60-61; Response, Att. C (Ch. 91 Resp. at 3-4, 108-09 & 401 Resp. at 50-51). NOAA Fisheries has indicated that these proposed mitigation measures could adequately offset temporary impacts on quahogs. FEIS at 4-98. *See also* Letter from Patricia Kurkul, NOAA Regional Administrator, to Magalie Salas, FERC Secretary (Sept. 17, 2004), at 10 (Attached at A-16).

LNG Terminal Site Impacts

Activities related to the LNG terminal site, including construction, will not have significant environmental impacts. The current site layout has eliminated the filling of salt marsh, mapped shellfish habitat, subtidal habitats and coastal dune. Consist. Cert., App. A at 16. Construction activities have been found to be in compliance with Massachusetts water quality standards. *See* Response, Att. C (Water Quality Cert.) (determining there is a reasonable assurance that construction of LNG terminal facilities will be conducted in manner which will not violate water quality standards at 314 Mass. Code Regs. 4.0). Also, the proposed stormwater management system for the site has been designed to comply with MADEP's Stormwater Management Policy. *See* Consist. Cert., App. A at 13-14. In addition, impacts associated with construction activities would be minimized by use of standard construction techniques set forth in the FERC's Upland Erosion Control, Revegetation, and Maintenance Plan and Wetland and Waterbody Construction and Mitigation Procedures. FEIS at 4-57.

The Project will only have a minimal impact on intertidal habitat due to the limited area affected and the mitigation measures that Weaver's Cove will implement. A small

amount (approximately 0.56 acres) of intertidal habitat will be permanently filled by shoreline site development activities. *See* Consist. Cert., App. A at 12. Weaver's Cove, however, has developed a mitigation plan for intertidal habitat impacts, during consultations with the USACE and MADEP. *See id.* at 16. To mitigate impacts, Weaver's Cove will create approximately 0.7 acres of new salt marsh habitat and approximately 0.25 acres of new subtidal habitat at the terminal site. *Id.* Weaver's Cove will also voluntarily create approximately 0.18 acres of freshwater wetlands at the terminal site. MADEP has determined that "[w]ith the implementation of these measures and [the conditions set forth in the Water Quality Certification, MADEP] is satisfied that adequate measures have been taken to avoid, minimize and mitigate for the wetland impacts." Response, Att. C (Water Quality Cert.).

With respect to groundwater, the FEIS found that "[c]onstruction and operation of the project would not have a significant impact on public or private drinking water supplies, or availability." FEIS at 5-4. The FEIS also acknowledges that while "[s]oil and groundwater at the LNG terminal site are contaminated with petroleum from prior petroleum storage and distribution activities," the Project "would have minimal impacts on groundwater quality, the groundwater and contaminant flow regime, and the on-going remediation efforts" in which Weaver's Cove would participate. *Id.* *See also* Response, Att. C (Ch. 91 Resp. at 68-69, 153, 180 & 401 Resp. at 106, 107).

Finally, approximately 800 square feet of subtidal habitat will be occupied by the footprint of the piles for the new jetty structure. However, the new jetty will be located closer to the shoreline, will have fewer piles, and will occupy less watersheet than the existing pile-supported jetty at the site (Consist. Cert., App. A at 12), thereby minimizing its impacts on the resources of the coastal zone.

2. The National Interests Furthered by the Project Outweigh the Adverse Coastal Effects

Because, as the FEIS has found and the evidence in the record demonstrates, the adverse effects of the Project on the coastal zone are temporary, minimal or mitigatable, these adverse effects are insufficient to outweigh the considerable national interests promoted by the Project. As explained in Section I-A, *supra*, the Project significantly and substantially furthers the national interests in: (1) coastal-dependent energy facilities and (2) the development of the coastal zone. *See* 16 U.S.C. §§ 1452(1), 1452(2)(D). The Project, therefore, satisfies Element 2.

3. Cumulative Effects

Assessing the cumulative adverse effects associated with the Project does not alter in any way the conclusion that the national interests promoted by the Project outweigh any adverse coastal effects. Cumulative adverse effects have been defined to mean "the effects of an objected-to activity when added to the baseline of other past, present and reasonably foreseeable future activities occurring in the area of, and adjacent to, the coastal zone in which the objected-to activity is likely to contribute to adverse effects on the natural resources of the coastal zone." *Amoco* at 39 (citing *Decision and Findings in the Consistency Appeal of Gulf Oil Corporation* (Dec. 23, 1985), at 8).

The FERC and FEIS cooperating agencies undertook a comprehensive cumulative impacts analysis in the FEIS similar to the cumulative effects analysis contemplated as part of Element 2. *See* FEIS at 4-297 to 4-314. The FEIS's cumulative impacts analysis considered the impacts that result "when impacts associated with a proposed project are superimposed on, or added to, impacts associated with past, present, or reasonably foreseeable future projects within the area affected by the proposed project." FEIS at 4-297. The FEIS reviewed cumulative impacts on resources such as aquatic resources, upland and wetland vegetation, air quality, and

noise from the Weaver's Cove Project, in combination with impacts from 25 other past, present and future activities. FEIS at 4-297 to 4-301.

The FEIS found that "while construction and operation of the Weaver's Cove LNG Project could contribute cumulatively to impacts on aquatic resources and water quality in the Taunton River, Mount Hope Bay, and Narragansett Bay, . . . these impacts would be relatively short-term and/or minor in comparison to those from non-point sources of pollution or from operation of [other] facilities,"[12] and that "implementation of Weaver's Cove Energy's proposed mitigation measures and [the FEIS] recommendations [] would reduce impacts of the proposed project such that, even when considered in light of past or present activities in the general project area, aquatic resources would not be adversely affected by project activities." FEIS at 4-305. The FEIS also found that the total increase in air emissions within the air basin from the Weaver's Cove Project and other potential LNG projects "would not be significant in comparison to other existing air emission sources," and indeed found that "it is possible that the Weaver's Cove LNG Project could cumulatively *improve* air quality in the region by providing a competitively priced source of natural gas that could replace the more polluting forms of energy that are currently being used." *Id.* (emphasis added).

As shown above, in the Approval Order, the FEIS, the SFEIR, and the Response (and the documents attached thereto), the adverse coastal effects of the Project, both separately and cumulatively, are insignificant in magnitude, short-term in effect, or can be minimized

[12] In reaching this conclusion, the FERC also considered the effects of the intake of ballast water and propeller wash generated by LNG tankers transiting to the Project's proposed terminal. FEIS at 4-304 to 4-305. Other evidence in the record supports the finding that the effects of ballast water intake and propeller wash are not significant. *See* FEIR 1-14 to 1-15 & App. 8-6 (ASA memorandum on ballast water effects) (Attached at A-17); SFEIR at 2-26 to 2-28; Response, Att. C (Ch. 91 Resp. at 35-44 & 401 Resp. at 25-30, 105).

through mitigation measures. Accordingly, they are far outweighed by the significant and substantial national benefits of the Project, as identified and discussed above in Section I-A.

C. Element 3 — There Is No Reasonable Alternative to the Weaver's Cove Project

There is no reasonable alternative available to the Weaver's Cove Project. For purposes of Element 3, MCZM "bears the burden of identifying, with sufficient specificity, an alternative that is consistent with its coastal management program." *Islander East* at 35. The "Secretary shall not consider an alternative unless the State agency submits a statement, in a brief or other supporting material, to the Secretary that the alternative would permit the activity to be conducted in a manner consistent with the enforceable polices of the management program." 15 C.F.R. § 930.121(c). Here, MCZM has not stated any such alternative. *See* 15 C.F.R. § 930.63(b) (state may include alternatives in its consistency objection). In any event, for the reasons set forth below, no such reasonable alternative is available.

The Secretary has determined that for an alternative to be "available," it must be one that the project proponent is able to implement, and it must achieve the primary purpose of the project. *Islander East* at 40. Here, the primary purpose of the Project is to supply natural gas to the New England market area by developing an import terminal and facilities for the storage of LNG, easy access to an existing natural gas pipeline system (only six miles total of new pipeline is required to interconnect with the interstate grid), and a competitive source for trucking LNG to satellite storage facilities throughout the region. FEIS at 1-5 to 1-6. In furtherance thereof, the primary purpose of the proposed dredge and fill activities is to improve and maintain the existing Federal Navigation Channel to facilitate the transit of LNG ships to and from the FERC-approved LNG terminal, to maintain and improve the turning basin required to support the berthing and unloading of LNG vessels, and to facilitate the laying of one of the Mill River pipeline laterals.

When preparing the FEIS for the Project, FERC, in cooperation with the USACE and the other FEIS cooperating agencies, "evaluated a number of alternatives to the Weaver's Cove LNG Project to determine if any are reasonable and environmentally preferable to the proposed action." *Id.* at 3-1. The FERC considered a number of alternative natural gas infrastructure proposals, conservation and other sources of energy, system alternatives, and dredging and dredge disposal alternatives. Based on the extensive record analysis, the FEIS found no clearly preferable alternative to the proposed action, and that each alternative presented its own unique set of impacts. Approval Order at P 105. Since there was no reasonable alternative to the siting of the terminal, it follows that there are no alternatives to constructing the requisite berthing and unloading structure at the terminal, connecting the terminal to established pipeline facilities, dredging the Federal Navigation Channel to allow LNG ships to serve the FERC-approved terminal, and dredging and backfilling the pipeline lateral trench for Mill River.

II. THE WEAVER'S COVE PROJECT IS IN THE INTEREST OF NATIONAL SECURITY

Alternatively, the Secretary should override MCZM's objection on the ground that the Weaver's Cove Project is necessary in the interest of national security. 16 U.S.C. § 1456(c)(3)(A); 15 C.F.R. § 930.122. A federal license or permit activity is "necessary in the interest of national security" if "a national defense or other national security interest would be significantly impaired were the activity not permitted to go forward as proposed." 15 C.F.R. § 930.122. Under this standard, the Secretary should find that the Project is necessary in the interest of national security because it will enhance domestic energy security by providing increased supplies of natural gas to the New England region and by diversifying natural gas infrastructure in the United States.

As discussed above in Section I-A-3, demand for natural gas in New England is growing. At the same time, the region relies entirely upon external sources of natural gas and has limited storage capacity to meet that growing peak period demand. Governors' Report at 4, 6 (stating that New England's LNG storage capacity can only provide ten days' worth of supply during peak demand periods). Without new natural gas supplies, "[t]he consequences of a shortfall in pipeline capacity or supplies . . . can be dire . . . set[ting] off an extended gas outage that would risk public safety in freezing temperatures." *Id.* at 26. The Project will help prevent a looming supply shortfall by providing a new source of natural gas to meet demand and by increasing storage.

In addition, the Weaver's Cove Project will diversify the Nation's energy infrastructure. At present, most new LNG terminals are being sited in the Gulf of Mexico and therefore are subject to the risks of hurricane activity, including delays to LNG deliveries and damage to infrastructure which could result in the reduction of natural gas transmission to regions such as New England that depend upon such supplies. By locating its LNG infrastructure in New England, the Weaver's Cove Project could help meet demand and stabilize regional and national gas markets in the event of a major disruption to energy in the Gulf of Mexico. This beneficial impact to national security is underscored by the substantial loss of energy supply following Hurricanes Katrina and Rita. EIA, "Natural Gas Annual 2005 Summary Highlights" (Nov. 16, 2006). In response to these disasters, former Secretary of the Interior Gail A. Norton commented upon the importance of domestic energy supply diversification:

> Hurricanes Katrina and Rita clearly demonstrated we have no margin to mitigate the impacts of natural disasters on our energy supply. [W]e need to increase our energy supply and invest in our energy infrastructure . . . Diversification of our Nation's energy

> supply is . . . a top priority for our Nation's economic and national security.

Testimony before the Senate Committee on Energy and Natural Resources (Oct. 27, 2005). By helping to achieve this "top priority for our . . . national security," the Project is thus necessary in the interest of national security.

CONCLUSION

For the foregoing reasons, Weaver's Cove respectfully asks the Secretary to find and conclude that:

One. The Weaver's Cove Project — a major coast-dependent energy facility proposed for an industrial site in a Massachusetts Designated Port Area — is consistent with the objectives and purposes of the Act, and as such, MCZM's objection should be overridden.

Two. The Weaver's Cove Project is necessary in the interest of national security, and as such, MCZM's objection should be overridden.

CONSOLIDATION

Although the applicable facts of the two projects differ since they perform different (but related) functions, require different construction techniques and are operated differently, Weaver's Cove does not object to the consolidation of the instant appeal with the concurrent appeal of Mill River to the extent that consolidation is administratively convenient for purposes of demonstrating that the overall national interest promoted by the Weaver's Cove and Mill River activities is the same.

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Figure 1